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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 337-342

314-659

PRIME SECURITIES CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

MICHIGAN SILICA COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

GENERAL CHROMIUM CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

SENIOR INVESTMENT CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

UDYLITE COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

STANDARD COTTON PRODUCTS COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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REARDON-PARSHALL CO.—DETROIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

The petitioners, by their attorney, pray that Writs of Certiorari issue to review the judgments of the United

States Circuit Court of Appeals for the Sixth Circuit entered in these cases on May 15, 1941, affirming the decisions of the District Court of the United States for the Eastern District of Michigan.

OPINIONS BELOW

The District Court did not file any opinion. The opinion of the Circuit Court of Appeals (R. at end) is recorded in 119 F. (2d) 939.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1941 (R. at end). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934 imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the due process clause of the Fifth Amendment to the Constitution of the United States.

2. Whether said Sections of said Acts impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4 of the Constitution of the United States.

STATUTES INVOLVED

This will be found in the Appendix, *infra*, pp. 16-19.

STATEMENT

The facts as set out in the petitions, as amended, of each of the petitioners, and as admitted by respondent's demurrer (R. 19) are substantially as follows:

Prime Securities Corporation

Petitioner is a Michigan corporation, engaged in business of investing and trading in stocks and securities.

Petitioner's declared values for capital stock tax purposes during the years 1933 to 1938 showed variations from approximately $1,900,000.00 in 1933 to $2,400,000.00 in 1934 to $99,000.00 in 1937 (R. 20).

The declared value for the year 1933 was determined by the Secretary of the company and was based on its net worth as of December 31, 1932, using the market value of assets held. For the years 1934, 1936 and 1938, the declared value was determined upon an estimate of the maximum profits for those years (R. 23).

During the year, petitioner was called upon to pay off its bank loans to the extent of $2,263,950.00. In order to do this, petitioner was compelled to sell in the same year 83,850 shares of General Motors Corporation common stock. Using the corporate cost basis for said shares, or the market value at the time of acquisition, no excess-profits tax was due from petitioner. However, the Commissioner of Internal Revenue has taken the position that in determining the excess-profits tax liability of petitioner for 1933, the basis for said shares of stock is the cost of said stock to the transferors, and is claiming a deficiency of $57,020.10 of excess-profits tax (R. 20-21).

The petitioner's net worth according to its books of account and according to market value of assets at the close of each of the calendar years 1931 to 1938 is set out at page 22 of the record and shows large differences and fluctuations.

Petitioner's net income for the years 1931 to 1938 show wide fluctuations (R. 22). In 1931 there was a loss of about $7,500.00 and in 1933 the net taxable income was over $1,000,000.00. However, if the corporate cost of the securities sold in 1933 were used in determining net taxable income, the corporation incurred a loss of about $340,000.00.

Michigan Silica Company

Petitioner is a Michigan corporation engaged in the manufacture and sale of Silica. There were wide fluctuations in petitioner's earnings and net worth during the years 1929 to 1938 (R. 22).

General Chromium Corporation

Petitioner is a Delaware corporation, holding 50% of the outstanding capital stock of United Chromium, Inc., which latter corporation was the owner and holder of various patents pertaining to chromium plating. Petitioner's net sales, royalties and net taxable income, and also its net worth as per books during the years 1929 to 1938 show large fluctuations. In 1935 petitioner received its first dividends from United Chromium, Inc. in a total of $25,000.00. In 1936 petitioner received such dividends in a total of $132,500.00. During the latter part of 1936, one of the important patents of United Chromium, Inc., was declared invalid, and as a result thereof the earnings of

United Chromium, Inc. were greatly reduced and it was unable to pay and petitioner did not receive any dividends after 1936 (R. 22).

Senior Investment Corporation

Petitioner is a Michigan corporation engaged in investing and trading in stocks and securities. Petitioner's declared values for capital stock tax purposes during the years 1933 to 1938 show variations from $7,500,000.00 in 1933 to $1,000,000.00 in 1934 to $9,000,000.00 in 1936 (R. 20). At time of organization its outstanding and paid-in capital stock amounted to approximately $88,-000,000.00. In August of 1933, the petitioner was reorganized by a transfer of part of its assets to a Delaware corporation in exchange for all of the stock of such corporation. Immediately prior to such reorganization the total market value of its assets was approximately $27,-000,000.00 (R. 21). Petitioner's net taxable income for the years 1929 to 1938 show tremendous fluctuations, varying from approximately $9,000.00 in 1929 to $3,800,-000.00 in 1930 to a loss of $53,000.00 in 1932, and a net taxable income of $700,000.00 in 1936 (R. 22).

Udylite Company

Petitioner is an Indiana corporation engaged in the manufacture and distribution of equipment and supplies for the electro plating and polishing industry, and owning and holding patents and processes of electro plating. Petitioner's net worth according to its books and also its net sales, royalties and net taxable income for the calendar years 1929 to 1938 show wide fluctuations (R. 22).

Standard Cotton Products Company

Petitioner is a Michigan corporation engaged in the manufacture and sale of cotton batting and pads for automobile upholstering. Petitioner paid excess-profits taxes of $1,984.07 for the calendar year 1934, and $5,027.57 for the calendar year 1935 (R. 20). Petitioner's net worth according to its books and net sales, gross profit and net taxable income, for the years 1931 to 1938 show wide fluctuations (R. 21). If petitioner had not been permitted by subsequent statute to change its declaration of value in the year 1933 and 1934, it would have been liable for large amounts of excess-profits taxes (R. 22-23).

The petitioners filed timely claims for refund of the capital stock taxes sued for and upon rejections of said claims filed suit in the United States District Court for the recovery thereof.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In failing to hold that Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934, imposing a capital stock tax for the years ended June 30, 1933 and June 30, 1934, respectively, are so unreasonable, arbitrary, capricious and discriminatory as to violate the due process clause of the Fifth Amendment.

2. In failing to hold that said Sections of said Acts impose a direct tax in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4, of the Constitution of the United States.

3. In affirming the judgments of the District Court dismissing petitioners' suits.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals in these cases has decided an important constitutional question which has not been, but should be settled by this Court.

2. There is great uncertainty as to what is the true nature of the capital stock tax. The government has taken contradictory positions in different cases.

a. In *Haggar Co. v. Helvering,* 308 U.S. 389, this Court stated the Government's contention as follows:

> "In making these contentions, the Commissioner concedes that the amount of the declared value of capital fixed for the first year is a matter of indifference to the Government since the statute leaves the taxpayer free to declare any amount which its fancy may choose • • • ."

b. In the Government's brief filed in the Circuit Court in the case of Prime Securities Corporation, petitioner herein, it is stated—"The taxpayer might have declared a reasonable value as Congress intended • • • ."

c. The decisions of the lower Courts are in conflict on this question. The larger number of cases passing on this question have held that the declared value need have no relationship to actual value. *Allied Agents, Inc. v. United States,* 26 Fed. Supp. 98; *Rochester Gas & Electric Corporation v. McGowan,* 115 Fed. (2d) 935 (CCA 2). A few other of such cases have held that the purpose of the Act is to impose a tax based on a fair and reasonable value of the stock. *Kentucky Fire Brick Co. v. Glenn,* 34 Fed.

Supp. 35; *Oertel v. Glenn*, 13 Fed. Supp. 651; *Utah Oil Refining Company v. Hinchley*, ... F. (2d) ..... (CCA 10).

d. The Third Circuit Court of Appeals has said—"We think that these capital stock tax cases are ad valorem taxes • • • ." *American Viscose Corporation v. Rothensies*, ... F. (2d) ..... If that were true, the tax would be unconstitutional because it is not apportioned according to population.

3. It is highly desirable that this Court determine the true nature of the capital stock tax and the constitutionality thereof in connection with *Scaife & Co. v. Commissioner*, where on June 2, 1941, this Court granted certiorari. That case involves the question as to whether an amended capital stock tax return may be filed after the expiration of the filing date. There are also pending in this Court the petitions for rehearing of General Motors Corporation and United Motor Service, Inc. (Nos. 738, 739) on denial of petitions for Writs of Certiorari. These involve the same question as that presented in this petition.

BRIEF IN SUPPORT OF PETITION

Reference to the opinion below, jurisdiction, a statement of the questions presented, facts in the cases, specifications of errors to be urged, and reasons for granting the writ, will be found in the foregoing petition. The statutes involved are set out in the Appendix, *infra*, pp. 16-19.

SUMMARY OF STATUTES

These cases involve the constitutionality of Sections 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934. The former was adopted on June 16, 1933, the latter on May 10, 1934. Both sections impose an excise tax upon a corporate taxpayer with respect to doing business for any part of the year ending June 30, 1933 and 1934, respectively, of $1 for each $1,000 of the adjusted declared value of its capital stock. Said section 215 exempted any corporation which did not do business during a part of the period from the date of the enactment of the National Industrial Recovery Act (June 16, 1933) to June 30, 1933, and said section 701 exempted any corporation which did not do business during a part of the period from the date of the enactment of the Revenue Act of 1934 (May 10, 1934) to June 30, 1934. These sections require the filing of returns for the first year, making a declaration of the value of a corporation's capital stock—and provide that such declared value may not be amended. For all subsequent years the adjusted declared value was to be the original declared value after making certain specified capital adjustments.

Sections 216 and 702 of said Acts, respectively, impose for each income taxable year ending after the close of the first capital stock tax year, an excess-profits tax equivalent to 5 per centum of the corporation's income as was in excess of 12½ per centum of the adjusted declared value, determined as aforesaid.

Section 703 of the Revenue Act of 1934 limited the application of Section 215 of the National Industrial Recovery Act to the year ending June 30, 1933.

ARGUMENT

"This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment." *Nichols v. Coolidge*, 274 U.S. 531.

Assuming that the Acts in question require declarations of value of capital stock having some reasonable relation to fair value, we submit that there is no reasonable basis or standard for determining a value or capital stock for all time, as required by these Acts. A value declared under Section 215 of the National Industrial Recovery Act and 701 of the Revenue Act of 1934 was binding upon the taxpayer for all time. A value for capital stock as determined in 1933 may be fair and reasonable at that time, but may be wholly arbitrary, unreasonable and unfair in 1934 and subsequent years. The financial and economic history of this country during the last ten years is ample proof of this statement. The financial history of these petitioners as set out in the record filed herein further sustains it.

The capital adjustments required by said Acts have no reasonable relation to value and may readily run counter to changes in value. Distribution of earnings and profits under the statutes reduces the values as declared, whereas, it is apparent that regular dividend distributions by a corporation tend to increase the market value of its shares of stock. In the case of the petitioner, Prime Securities Corporation, the corporation made a declaration of value of $1,974,000.00, based on a net worth of the corporation as of December 31, 1932, using the market value of its assets. In 1933 the corporation sold a part of these assets.

Because of the statutory provision requiring the corporation to use the transferor's costs in determining the taxable gain thereon, the corporation secured a taxable gain of over a million dollars. While there was practically no change in the market value of the assets of the corporation, under the capital stock tax provisions, its declared value would be increased by over a million dollars. Many other examples of the same nature could readily be shown.

The privilege given by subsequent Congressional enactments to change the declaration of value made conclusively binding for all time in prior Acts does not render such prior Acts reasonable and constitutional. On the contrary, it is to some extent a recognition by Congress of the unreasonable nature of the requirements of such prior Acts.

> "The taxpayer may justly demand to know when and how he becomes liable for taxes. He cannot foresee and ought not to be required to guess the outcome of pending measures." *Untermeyer v. Anderson,* 276 U.S. 440.

Any declaration of value for all time cannot be based upon any of the underlying factors which the Courts have held must be taken into consideration in determining the value of the capital stock.

> "But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use." *Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v. Backus,* 154 U.S. 439.

Any declaration of value for all time cannot possibly have any reasonable relationship to any known or accepted

standard for determining value and a tax imposed on such declaration of value is not only so unreasonable and arbitrary as to be violative of the Fifth Amendment, but is also a direct tax imposed in violation of Art. I, Sec. 2, Subd. 3, and Art. I, Sec. 9, Subd. 4 of the Constitution of the United States. *Levy v. Wardell,* 258 U.S. 542.

Assume, however, that the statute does not intend that the taxpayer make a declaration having any reasonable relationship to actual value, and that the Acts in question permit the taxpayer to declare any value for its capital stock regardless of actual or fair value. In that situation, the capital stock tax provisions in question are unconstitutional because together with the excess-profits tax they compel the taxpayer to guess the future trend of its earnings for all time. The financial history of the petitioners, as disclosed by the record filed herein and the financial and economic history of this country, of which the Court will take judicial notice, show the utter impossibility of determining with any reasonable degree of accuracy, the trend of future earnings.

Judge Hamilton, now sitting in the Sixth Circuit Court and who concurred in the result only in these cases, in his opinion as District Judge in *Oertel v. Glenn,* 13 F. Supp. 651, said:

> "If the Act here in question (capital stock tax) is construed to raise a conclusive presumption that the tax is to be levied on the declared value of the taxpayer regardless of the actual value, it is violative of the Fifth Amendment."

The unreasonable nature of the Acts is disclosed by the facts in the cases here presented and especially by

the case of petitioner, Prime Securities Corporation. There the corporation made a declaration of value based on the market value of its assets. Shortly after the declaration, the corporation was compelled to sell a large block of stock in order to pay off its bank loans. By reason of the income tax provisions, this corporation was required to use the transferor's cost for the stock which it sold, resulting in a taxable gain of over a million dollars. Despite the fact that it made a declaration of value in accordance with market value of assets which the sale did not change, the Commissioner asserted a deficiency of over $57,000.00 of excess-profits tax against this corporation.

The necessity for raising revenue, preventing tax avoidance or the difficulty of administration, do not justify deprivation of constitutional rights. *Schlessinger v. Wisconsin,* 270 U.S. 230; *Heiner v. Donnan,* 285 U.S. 312.

RETROACTIVE FEATURES OF THE TAX

Under Section of the N. I. R. A., a corporation which was engaged in business during the entire period from July 1, 1932 to June 15, 1933, and ceased doing business on the latter date, was not liable for any tax for the year ending June 30, 1933, whereas, a corporation which was organized and started doing business on June 30, 1933, was subject to the tax for the entire year.

Under Section 701 of the Revenue Act of 1934, a corporation which did business during the entire period from July 1, 1933 to May 9, 1934, and ceased doing business on May 9, 1934, whereas, a corporation which was organized

and started doing business on June 30, 1934, was subject to the tax for the entire tax year. A period of sixteen days in one instance, and fifty days in the other, is by Congress declared to be a taxable year. We submit that the unreasonable, arbitrary and discriminatory nature of the retroactive provisions of the Act here in question, and the long period of retroactivity, render them unconstitutional. It is to be noted that the previous capital stock tax repealed in 1926 was applied prospectively and granted no discriminatory and unreasonable exemptions.

In *Hudson v. U.S.*, 12 F. Supp. 620; 13 F. Supp. 640, the Court of Claims in considering the question of the constitutionality of the "Silver Purchase Act" as an excise tax, said:

> "We think, putting these decisions together, it may be said that they hold in effect that if at the time a citizen enters into a transaction it is not taxable and he has no reason to believe or expect a tax will in the future be imposed by reason of it, a valid tax thereon cannot be laid by subsequent Statute."

While this Court on appeal upheld the constitutionality of this Act, it did not deny the validity of the principal as thus stated by the Court of Claims. It sustained the Act on the ground that it imposed "a special income tax", and that the period of retroactivity (35 days) was not unreasonable. *U.S. v. Hudson*, 299 U.S. 498. See also, *Nichols v. Coolidge*, 274 U. S. 531.

The retroactive application of the capital stock tax also destroys the character of the tax as one on privileges and so renders it invalid as an unapportioned direct tax for-

bidden by Sections 2 and 9 of Article I of the Constitution. *Milliken v. U.S.*, 283 U.S. 15; *Levy v. Wardell*, 258 U.S. 542.

WHEREFORE, it is respectfully submitted that this petition for Writs of Certiorari to review the judgments of the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

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APPENDIX

Capital Stock and Excess-Profits Tax

(Imposed by National Industrial Recovery Act of June 16, 1933.)

Sec. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 per each $1,000 of the adjusted declared value of its capital stock.

Sec. 215. (b) For each year ending June 30 there is hereby imposed upon every foreign corporation with respect to carrying on or doing business in the United States for any part of such year an excise tax equivalent to $1 for each $1,000 of the adjusted declared value of capital employed in the transaction of its business in the United States.

Sec. 215. (c) The taxes imposed by this section shall not apply——

Sec. 215. (c) (1) To any corporation enumerated in section 103 of the Revenue Act of 1932;

Sec. 215. (c) (2) To any insurance company subject to the tax imposed by section 201 or 204 of such Act;

Sec. 215. (c) (3) To any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or

Sec. 215. (c) (4) To any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.

Sec. 315. (d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extensions shall be for more than sixty days.

Sec. 215. (e) Returns required to be filed for the purpose of the tax imposed by this section shall be open to

inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under Title II of the Revenue Act of 1926.

Sec. 215. (f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with the regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period

specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

Sec. 215. (g) The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Sec. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in Section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

Sections 701 and 702 of the Revenue Act of 1934 are substantially similar to the above Sections.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 337

PRIME SECURITIES CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 338

MICHIGAN SILICA COMPANY, PETITIONER

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UDYLITE COMPANY, PETITIONER

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STANDARD COTTON PRODUCTS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court for the Eastern District of Michigan did not file an opinion. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 4–8 at end) is reported in 119 F. (2d) 939.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on May 15, 1941 (R. 1–4 at end). The petition for writs of certiorari was filed August 4, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the capital stock tax provisions of the National Industrial Recovery Act and of the Revenue Act of 1934 are unconstitutional.

STATUTES INVOLVED

These will be found in the Appendix, *infra*, pp. 6–11.

STATEMENT

Each of these cases is for the recovery of capital stock taxes paid by the respective taxpayers for the taxable years ended June 30, 1933, and June 30, 1934. In each case, timely claims for refunds were filed and, upon rejection thereof by the Commissioner, timely actions were commenced (R. 1, 6–18). The United States filed motions to dismiss each petition (R. 19). These motions were sustained by the district court (R. 25) and its judgments were affirmed by the court below (R. 1–4 at end).

The material facts in each case, as set forth in the amended petitions, are that the taxpayer is a domestic corporation which filed capital stock tax returns for the taxable years ended June 30, 1933, and June 30, 1934, that the adjusted values which the taxpayer declared for its capital stock in various years varied widely, and that there were wide fluctuations in the taxpayers' net worth in various years (R. 21–22).

The petition in each case alleged that the taxpayer, in arriving at the value to be declared for its capital stock, was forced to guess the future

trend of its earnings in order to avoid future excess profits taxes and was forced to ignore any previously known standards of value (R. 3); that the taxing statutes are so unreasonable, arbitrary, capricious and discriminatory as to violate the due process clause of the Fifth Amendment to the Constitution (R. 8–9); and that the taxing statutes are unconstitutional as imposing direct taxes without apportionment (R. 9).

ARGUMENT

This Court has denied five similar petitions for writs of certiorari: *Allied Agents, Inc.* v. *United States,* 26 F. Supp. 98 (C. Cls.), certiorari denied, 308 U. S. 561; *Tennessee Consolidated Coal Co.* v. *United States,* 89 C. Cls. 542, certiorari denied, 310 U. S. 649; *Chicago Telephone Supply Co.* v. *United States,* 23 F. Supp. 471 (C. Cls.), certiorari denied, 305 U. S. 628; *General Motors Corp.* v. *United States,* 35 F. Supp. 466 (C. Cls.), certiorari denied March 31, 1941, No. 738, October Term, 1940; *United Motors Service, Inc.* v. *United States,* 35 F. Supp. 466 (C. Cls.), certiorari denied March 31, 1941, No. 739, October Term, 1940. In addition to these cases, the capital stock tax provisions have been upheld in *Rochester Gas & Electric Corp.* v. *McGowan,* 115 F. (2d) 953 (C. C. A. 2); *American Viscose Corp.* v. *Rothensies* (C. C. A. 3), decided June 6, 1941, not yet officially reported but found in 1941 C. C. H., Vol. 4, par. 9516; and *Utah Oil Refining Co.* v. *Hinckley* (C. C. A. 10), decided June 25, 1941, not yet officially reported but found in 1941 C. C. H., Vol. 4, par.

9573.[1] Cf. *Briggs-Darby Const. Co.* v. *Commissioner*, 119 F. (2d) 89 (C. C. A. 5), holding the related excess-profits tax to be constitutional. Decisions of the district courts and of the Board of Tax Appeals, which are collected in the opinion of the court below (R. 5 at end), are uniformly to the same effect. There is no decision to the contrary.

CONCLUSION

The decision below is correct and accords with the uniform course of authority. There is no conflict. No reason of substance is advanced for granting the writs in these cases that has not already been urged in other similar cases in which petitions for certiorari have been denied. The petition in this case should likewise be denied.

Respectfully submitted.

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AUGUST 1941.

[1] The only similar cases now pending in a circuit court of appeals are four in the seventh circuit. These cases have not yet been submitted, extensions of time for filing briefs therein having been granted at the request of the taxpayers' counsel, of whom counsel for the present petitioners is a member.

APPENDIX

National Industrial Recovery Act, 48 Stat. 195:

SEC. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not incon-

sistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value

in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

* * * * *

SEC. 216. (a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 215, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 215. The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.

* * * * *

Revenue Act of 1934, 48 Stat. 680:

SEC. 701. *Capital stock tax.*

(a) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, insofar as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

* * * * *

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last

income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid in surplus and contributions to capital, (3) its net income, (4) the excess of its income wholly exempt from the taxes imposed by Title I over the amount disallowed as a deduction by section 24 (a) (5) of such title, and (5) the amount of the dividend deduction allowable for income tax purposes, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings or profits, and (C) the excess of the deductions allowable for income tax purposes over its gross income; adjustment being made for each income-tax taxable year included in the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. The amount of such adjustment for each such year shall be computed (on the basis of a separate return) according to the income tax law applicable to such year. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted (for the same income-tax taxable years as in the case of a domestic corporation), in accordance with regulations prescribed by the Commissioner with the ap-

proval of the Secretary, to reflect increases or decreases in the capital employed in the transaction of its business in the United States. (U. S. C., Title 26, Sec. 1358.)

SEC. 702. *Excess-profits tax.*

(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 701, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 701. If the income-tax taxable year in respect of which the tax under this section is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears the same ratio thereto as the number of months in the period bears to 12 months. For the purposes of this section the net income shall be the same as the net income for income tax purposes for the year in respect of which the tax under this section is imposed.

* * * * *

(U. S. C., Title 26, Sec. 341.)

U. S. GOVERNMENT PRINTING OFFICE: 1941